No. 83-1196

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1983

AMERICAN TRUCKING ASSOCIATIONS, INC., NEW YORK STATE MOTOR TRUCK ASSOCIATION, INC., NEW YORK STATE MOVERS' AND WAREHOUSEMEN'S ASSOCIATION, INC., FORT EDWARD EXPRESS CO., HALLAMORE MOTOR TRANSPORTATION, INC., MAISLIN TRANSPORT OF DELAWARE, INC., MUSHROOM TRANSPORTATION CO., RED STAR EXPRESS LINES OF AUBURN, INC., SHAY'S SERVICE, INC., and TEAL'S EXPRESS, INC.,

Appellants,

v.

NEW YORK STATE TAX COMMISSION, JAMES H. TULLY JR., THOMAS H. LYNCH, and FRANCIS KOENIG, Members of the New York State Tax Commission, and ROBERT ABRAMS, Attorney General of the State of New York,

Appellees.

On Appeal From the Court of Appeals of New York

BRIEF IN OPPOSITION TO APPELLEES' MOTION TO DISMISS OR AFFIRM

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1. The Section 184 Tax Is Invalid Because It Fails to Satisfy the Nexus Test of *Complete Auto Transit v. Brady*.

At page 5 of their Motion to Dismiss or Affirm, Appellees misstate the test established by this Court in *Complete Auto Transit v. Brady*, 430 U.S. 274 (1977). Appellees suggest that the nexus prong of the test is met, "where a taxpayer has a substantial nexus with a

State," and cite this Court's opinion in *Complete Auto* at page 279. Motion to Dismiss or Affirm at 5. However, at the cited page, this Court stated that taxes imposed on interstate commerce activities may be sustained when the tax is, among other things, "applied *to an activity* with a substantial nexus with the taxing State. . . ." *Id.* (emphasis added). A nexus with the transaction taxed and not merely a nexus with the taxpayer is required. See Jurisdictional Statement at 8-11.

At page 12 of their Motion to Dismiss or Affirm, Appellees deny that New York is attempting to justify the tax under the unitary business principle. However, where as here the tax reaches all gross receipts of taxpayers without regard to nexus, it could *only* be considered to meet the nexus requirement if that principle applied. There can be no doubt, nor do Appellees deny, that the tax applies a formulary apportionment to Appellants' nationwide gross receipts. However, as this Court has recently emphasized, such a formulary apportionment and the unitary business principle are two sides of the same coin. *Container Corp. of America v. Franchise Tax Board*, 103 S. Ct. 2933, 2939-43 (1983). Thus, if the unitary business principle does not supply the needed nexus with Appellants' non-New York activities, that nexus does not exist and the tax must be struck down.

Until now, states imposing taxes on business activity taking place in more than one jurisdiction have been required to divide the tax base among the various jurisdictions either on the separate allocation (or geographical assignment) principle or on the unitary business/formulary apportionment principle. Appellees now argue that this tax should be upheld although they apparently concede that it satisfies neither of these principles.

Appellees seek to justify the tax on the ground that it reaches only a fictional something called "New York gross earnings," which earnings are determined by the

formulary apportionment, and that it does not reach the actual gross receipts that are made subject to that apportionment. The core of Appellee's argument appears to be that even though the present tax reaches all gross receipts of the Appellants wherever earned, it does not *tax* those receipts. Thus, Appellees argue that, "[i]t is only by conjecture that it is possible for New York to reach earnings of the appellants which are not from New York sources . . . ." Motion to Dismiss or Affirm at 8. However, it is undisputed that five of the motor carrier Appellants (and many additional members of the trade association Appellants) have substantial gross receipts from transactions having no connection whatever to New York (Stipulation of Facts, Paragraphs 8(b)(F); 8(c)(F); 8(d)(F), 8(f)(F); Affidavit of Franklin Seligman, Paragraph 3(f)), and that all of those non-nexus receipts are included in New York's apportionable tax base. Moreover, it is undisputed that one of the motor carrier Appellants, Maislin, has gross receipts from intrastate commerce in Pennsylvania and that Pennsylvania imposes a tax on 100% of those receipts. Affidavit of Franklin Seligman, Paragraph 3(f); 72 P.S. Section 8101. To argue as Appellees do, that New York does not also tax an apportioned share of those non-nexus receipts is simply not in accordance with reality.

It is no answer to New York's inclusion of non-nexus receipts in the tax base that the equitable apportionment provision of Section 184(f) of the Tax Law *permits* the Tax Commission to grant relief to specific taxpayers who can prove that they are overtaxed. Equitable apportionment provisions are intended to provide flexibility in circumstances where an apportionment formula, as applied to activities having nexus with the taxing state, does not properly reflect the extent to which those activities took place within the state. Such provisions were never intended, and cannot be used, to extend the reach of an apportionment formula to activities lacking a nexus. Moreover, and more importantly, a *per-*

missive provision for equitable apportionment, such as Section 184(f), cannot be construed to cure the unconstitutional reach of this tax.

2. Appellees' Appeal to Practicality and Administrative Convenience Is Without Merit.

Appellees argue that the Section 184 tax is justifiable because:

> New York's apportionment formula is the practical way to reach gross earnings from all sources in New York from transportation. It would not be feasible to sift out New York gross earnings without using an apportionment formula where a trucking company makes a single charge for a trip between a point in New York to a point in another State and different types of goods are transported with several pickup and delivery stops being made in both states.

Motion to Dismiss or Affirm at 11. Appellants would agree with that statement and agree that formula apportionment is proper with respect to gross receipts earned for a trip between a point in New York and a point in another state. However, Section 184 does not take the clearly practical (and constitutionally required) step of eliminating from the gross receipts taxed by New York, all gross receipts earned through trips having no contact whatever with New York.

Appellees' appeal to administrative convenience is also without merit.[1] New York, like most other states,

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1. All but one of the cases cited by Appellees on this point are totally inapposite. *Califano v. Goldfarb*, 430 U.S. 199 (1977), and *Halliburton Oil Well Cementing Company v. Reily*, 373 U.S. 64 (1963), both struck down statutes in the face of a claim of administrative convenience. *Kahn v. Shevin*, 416 U.S. 351 (1974), and *Burnet v. Wells*, 289 U.S. 670 (1933), both upheld tax statutes but not, to any degree, on the ground of administrative convenience. The remaining case, *New York Rapid Transit Corp. v. City of New York*, 303 U.S. 573 (1938), did cite administrative convenience along with a host of other grounds for upholding the tax; however, it is clear that administrative convenience was in no sense dispositive in that case.

imposes an apportioned net income tax on most business corporations. Such taxes are administratively convenient for the states because they typically are based on net income as reported to the Federal government and the states are therefore able to rely on the Internal Revenue Service for most audit and enforcement activities. If New York chooses to impose on transportation companies a different kind of tax, it is not entitled to reduce the resulting audit burdens by sweeping aside constitutional limitations on taxation of interstate commerce.

Appellees suggest that if the tax were limited to transactions having a nexus, taxpayers could somehow improperly assign earnings to out-of-state business. Motion to Dismiss or Affirm at 12. However, the exclusion of non-nexus receipts from New York's tax would not provide any such opportunities — the question whether particular earnings resulted or did not result from transportation having a nexus with New York is not subject to manipulation.

CONCLUSION

For the foregoing reasons, and for the reasons stated in Appellants' Jurisdictional Statement, this Court should note probable jurisdiction of this appeal.

Respectfully submitted,

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DATED: February 29, 1984